SUPREME COURT, U.S.
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92-321

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ANTHONY ELDRIDGE,

Petitioner,

versus

LOUIS C. EZELL, SUSAN EZELL, DOES 2 through 50, and ALL PERSONS CLAIMING BY, THROUGH OR UNDER SUCH PERSONS, AND ALL PERSONS UNKNOWN, CLAIMING ANY LEGAL OR EQUITABLE RIGHT, TITLE, ESTATE, LIEN, OR INTEREST IN THE PROPERTY DESCRIBED IN THE COMPLAINT, ADVERSE TO PLAINTIFF'S TITLE, OR ANY CLOUD ON PLAINTIFF'S TITLE THERETO, NAMED AS DOES 51 through 100,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT DIVISION ONE

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QUESTIONS PRESENTED FOR REVIEW

Judicial Taking - Under the Fifth and Fourteenth Amendments to the United States Constitution, can a "taking" of private property be the result of a judicial act such as the granting of an easement. And if such a "taking" is deemed to have occurred, who, if anyone, has the obligation to provide "just compensation?"

Declaratory Taking - Under the Fifth and Fourteenth Amendments to the United States Constitution, do the courts by declaration, or the state legislature by statute, have more latitude for a declaratory "taking" without "just compensation," of private property from one person, for the private use of another, than they would have under a "taking" for public use? And if the courts and legislatures do not have such latitude, should they be limited in the quality and quantity of property which may be transferred by statutory prescriptive fiction and in the absence of "just compensation."

Limitation of Rights - Under the Fifth and Fourteenth Amendments to the United States Constitution, can a court grant unlimited right to exclusive possession and use of an entire parcel of private real property, when such right deprives the recorded fee owner of all economically beneficial uses, and is contrary to reasonable, investment-backed expectations of such real property; and can such a right be granted by the courts without a concurrent order for "just compensation."

Limitation of Prescription - Under the Fifth and Fourteenth Amendments to the United States Constitution is there a limit to the permissible amount of judicial reallocation of private real property which may be ordered without "just compensation?" And where adverse possession is not established, should the grant necessarily fall short of depriving the record owner of all economically beneficial uses, and be contrary to reasonable, investment-backed expectations of such real property?

Illegal Conduct - Under the Fifth and Fourteenth Amendments to the United States Constitution, may a court of equity by judgment, or a state legislature by law, be permitted to reward intentional illegal trespass with a grant of a prescriptive estate in real property? May such grant be without "just compensation?"

Contract Clause - Do any or all of the above actions violate the Contracts clause of the United States Constitution, in that they impair the obligation of contracts, both between individuals and between an individual and the state.

Due Process - In the absence of an eminent domain (or "private domain") proceeding, do any of the above actions constitute a violation of the rights of the property owner (petitioner) to due process, prior to the deprivation of his lawful right, title, and interest, as guaranteed by Fifth and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE ACTION

Plaintiff, Cross-defendant, Appellant and Petitioner:

ANTHONY ELDRIDGE

Defendants, Cross-complainants, Appellees and Respondents:

LOUIS C. EZELL, SUSAN EZELL, - Does 2 through 50, and all persons claiming by,through or under such persons, and all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint, adverse to plaintiff's title, or any cloud on plaintiff's title thereto, named as does 51 through 100,

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PETITION FOR WRIT OF CERTIORARI

Petitioner Anthony Eldridge respectfully prays that a Writ of Certiorari issue to the California Court of Appeal, Second Appellate District, Division One, to review judgment entered on March 4, 1992; (Review Denied May 20, 1992, Supreme Court of the State of California). Said judgment holds that the courts of the State of California are empowered to "take" petitioner's real property from him without "just compensation," without due process, and to give and grant such property to another private party. In addition, said judgment deprives petitioner of due process, and impairs established contracts between parties and the state.

GROUNDS FOR U.S. SUPREME COURT JURISDICTION

Proceedings and Jurisdiction Below

This petition is based on review of an opinion of the California Court of Appeal, Second District, Division One, and affirmed as of March 4, 1992 (see Appendix). Request for Rehearing was filed March 19, 1992 and denied March 27, 1992 (see Appendix). Petition for Review was filed with the Supreme Court of the State of California, and "denied" dated May 20, 1992 (see Appendix). Remittitur was issued June 23, 1992 (see Appendix). The Judgment and Statement of Decision of the Los Angeles Superior Court are also appended hereto. (see Appendix).

Federal Question

The within case falls under the jurisdiction of the Supreme Court of the United States of America in that, inter alia, it involves substantial questions of abridgement of private property rights under Article One, Section 10 of the United States Constitution, and of the Fifth and Fourteenth Amendments to the United States Constitution.

These matters remain unsettled within the states, and among federal and state jurisdictions. Ambiguities and

uncertainties persist regarding the nature, scope and limitations of the court's power to reallocate property rights among citizens, and as to the requirement for "just compensation" under such circumstances.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (1992):

> Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

Certiorari, and not appeal, is the proper mode of seeking review of decision of the court of appeal dealing with questions of state law.[1]

[The] Supreme Court will grant certiorari in case involving constitutionality . . . because of important constitutional question involved, and because of apparent conflict in approaches to question[s] . . .[2]

28 U.S.C. §2403(b) may be applicable to this case.

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1 *Public Service Com. v Batesville Tel. Co.* (1931) 284 US 6, 76 L Ed 135, 52 S Ct 1; *Baxter v Continental Casualty Co.* (1931) 284 US 578, 76 L Ed 502, 52 S Ct 2.

2 *Saxbe v Washington Post Co.* (1974) 417 US 843, 41 L Ed 2d 514, 94 S Ct 2811, 1 Media L R 2314.

CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

Fifth Amendment to the United States Constitution

Article V - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution

Article XIV - Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 10 of the United States Constitution

Article I - Sect. 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold or silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility. . . .

California Civil Code Section 1006

§1006. Title conferred by occupancy. Occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will, or succession; but the title conferred by occupancy is not a sufficient interest in real property to enable the occupant or the occupant's privies to commence or maintain an action to quiet title, unless the occupancy has ripened into title by prescription. Enacted 1872. Amended Stats 19115 ch 554 §1; Stats 1980 ch 44 §1.

California Code of Civil Procedure Section 318.

§318. Seisin within five years, when necessary in action for real property. No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question within five years before the commencement of the action. Enacted 1872.

California Code of Civil Procedure Section 319.

§319. Such seisin, when necessary in action or defense arising out of title to or rents of real property. No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted, or the defense is made, or the ancestor, predecessor, or grantor of such person was seised or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made. Enacted 1872.

California Code of Civil Procedure Section 321.

§321. Possession, when presumed; Occupation deemed under legal title, unless adverse. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for five years before the commencement of the action. Enacted 1872.

California Code of Civil Procedure Section 325.

§325. What constitutes adverse possession under claim of unwritten title. For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment or decree, land is deemed to have been possessed and occupied in the following cases only:
1. Where it has been protected by a substantial inclosure.
2. Where it has been usually cultivated or improved.
Provided, however, that in no case shall adverse possession be considered established under the provisions of any section or sections of this code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal which have been levied and assessed upon such land. Enacted 1872. Amended Code Amdts. 1877-78 ch 590 §1.

FEDERAL ISSUES TIMELY RAISED

In his Petition for Review before the Supreme Court of the State of California (Ptn. p.1, par. 4), petitioner raised the issue of "taking" of private property without "just compensation."

Prior to that time, and throughout the Trial Briefs, Appeal, and Petition for Review, petitioner raised the question of the

unjust taking from him of his private property.

Exclusive right of possession and use of in excess of one legal parcel of real estate was "taken" from petitioner by the court and granted to another private individual without "just compensation" and without any legal basis for such transfer. This decision was affirmed on appeal with the appellate court stating that " . . . the case does not support Eldridge's claim that a prescriptive easement cannot extend over an entire lot." (Op., p. 16)

The estate granted was in excess of what could constitute a prescriptive easement, and it was clear by the admission of respondents[3] that the elements for adverse possession were not established.

It has been, and continues to be petitioner's contention that a grant of prescriptive use must fall short of depriving the record owner of all economically beneficial use of his property, and cannot be contrary to reasonable, investment-backed expectations of such real property. The "taking" issue has been central to the case since its inception.[4] Respondent fails to prove or assert payment, and admits non-payment of taxes on the subject property[5] and nowhere asserts a holding under color of title.

The absence of these factors removes this matter from the rubric of adverse possession. We are thus left only with questions of constitutional limits on prescriptive rights, and constitutional entitlement to "just compensation" therefore, either by statute or equitable declaration.

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3 Op., p. 5; RT 1439:16-1440:17.

4 See Trial Briefs, CT 787-791; CT 740-742; Appellant's Opening Brief, p. 29; Appellant's Reply Brief, p. 10; "Plaintiff/Appellant Eldridge prays the court to uphold his private property rights, and to protect his real property interests from wrongful confiscation by the public action of the court, without compensation, to the benefit of an unentitled private party. This amounts to nothing less than a complete 'taking' of private property."

5 App. Opening Brief p. 13; Op., p. 5; RT 1439:16-1440:17.

WHY REVIEW SHOULD BE GRANTED

The courts have made exceptional strides reconciling "police power" and regulatory "taking" with the constitutional rights of private property owners.[6] Nonetheless, a number of fundamental questions remain unanswered. Questions which relate to the "taking" of private property for *private use* in the absence of any contention of public benefit or police power.

The instant case presents several important and unresolved issues relating to "judicial taking," the limitations on the power of the judiciary to "take" real property rights from the known, recorded, fee owner, and the power of the state to enact laws which allow "taking" by the court on behalf of a third party. Private property can be taken for a public purpose only, and not for private gain or benefit.[7]

After having analyzed the threshold question of the power to "take" under the Fifth and Fourteenth Amendments to the United States Constitution, this Court is asked to review the necessity of "just compensation" to the owner of the property diminished, impaired or otherwise "taken."

There is an important and unresolved issue whether, absent proof sufficient to establish title by adverse possession (which admittedly could not be established here[8]), a party may nonetheless be awarded a prescriptive easement for the complete and unfettered use of property to the total exclusion of the owner of the fee estate. The California Supreme Court has expressly noted the existence of that question but declined to pass upon it.[9] Constitutionally, we must also argue the necessity for payment of "just compensation."

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6 *Lucas v. South Carolina Coastal Council* (1992) 92 Daily Journal D.A.R. 9030; *Nollan v California Coastal Commission* (1987) 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141

7 *Pine Grove Tp. v Talcott* 86 U.S. 666, 19 Wall. 666 22 L.Ed. 227

8 Op., p. 5; RT 1439:16-1440:17

9 Because it was not briefed by the parties the court declined to pass upon it in *Gilardi v. Hallam* (1981) 30 Cal.3d 317, 327.

The subject at hand is one which continues to generate a multitude of frivolous lawsuits. If the issue is equitably reconciled with the constitutional protections against "taking" without "just compensation," the judicial system would be spared literally thousands of frivolous and nominal easement cases. If put to the test, a great number of prescriptive easement claimants would be unwilling to pay fair value ("just compensation") for the legal perfection of their claimed rights.

These questions are routinely heard by a court sitting in equity. It seems the ends of justice and the mandates of the Constitution are only served where adequate balancing consideration is given to the record owner of the subject real property. This is especially so where it is proven or admitted that the claim arises out of an intentional trespass.

The difficulties inherent in the California Court of Appeal's holding were not lost to that court. The court frankly acknowledged its "uneasiness with the application of prescriptive easement law to these facts," declaring:

> "We think it unjust that one landowner can usurp extensive use of another's property without paying taxes on the land and without recording the fact, thus deceiving subsequent buyers like [plaintiff]" (see Appendix; Op., pp. 16, 17).

Nonetheless, the court believed that it was bound to apply "well established" rules (Op., pp. 16, 17). However, the untoward result in this case was not dictated by any established rules but rather resulted from the present uncertainty and confusion as to the controlling law.

The usurpation of an owner's property rights is a form of "taking" of such rights. It diminishes the estate and thus takes it from its owner of record.[10]

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10 See *Pennsylvania Coal co. v Mahon* (1922) 260 U.S. 393, 67 L.Ed. 322, 43 S.Ct. 158 discussing "diminution" of the property.

STATEMENT OF THE CASE

Statement of facts.

Plaintiff [Petitioner], Anthony Eldridge, and defendants [Respondents], Louis C. Ezell and Susan Ezell, are the owners of adjoining property overlooking Sunset Boulevard and the Los Angeles basin (Op., p. 2; CT 830-831). The Ezells own three lots, purchased in 1975, upon which their house and pool are situated (Op., p. 2; CT 831). Eldridge owns nine lots, purchased in 1985, to the north and west of the Ezells' property (Op., p. 2; CT 830-831).

A number of encroachments on Eldridge's property have been made by the Ezells or their predecessors. Those encroachments include a corner of a driveway, a small portion of the pool, pool decks, a pool house (or "shed"), walkways, a retaining wall and fences (Op., pp. 2-3; CT 834-835). The Ezells have never paid taxes on any portion of Eldridge's property (Op., p. 5; RT 1439:16-1440:17). None of the occupation is of necessity or used for any form of access.

Trial Court Proceedings.

Eldridge brought an action against the Ezells, inter alia, to quiet title and for a declaration of Eldridge's undisputed ownership, possession and use of all his property (CT 1-11, 626-639). The Ezells cross-complained, inter alia, for a declaration of ownership of a prescriptive easement over a portion of Eldridge's property (CT 37-50).[11] After a court trial, the judge issued his statement of decision finding that:

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11 The opinion of the Court of Appeal erroneously recites that the Ezells also sought a declaration of ownership by adverse possession (Op., p. 5). They did not (see CT 37-50). As the Ezells' counsel noted, "[adverse possession] is just not raised . . . because we have not paid taxes on the property" (RT 1440:16-17).

1. For the five-year prescriptive period, the Ezells "continuously, openly and notoriously used and possessed" a portion of Eldridge's property consisting of one full lot (Lot 352), over one half of another (Lot 1), and portions of two others (CT 831-832); and

2. All improvements in the area in question, "including but not limited to fences, the pool, pool equipment, pool house shed, concrete and redwood decking, concrete retaining walls, wood and concrete steps, blacktop driveway, and landscaped gardens, trees and shrubs" were installed more than five years ago and maintained continuously "in their same condition" for more than five years (CT 834).

The court then determined that, as a matter of law, the Ezells "are the owners of an easement by prescription for the continual, present and future use, maintenance and control, of all the above-mentioned items and that Eldridge is the owner of the underlying fee interest in the [easement] subject to the [Ezells'] prescriptive easement" (CT 835-836). Eldridge's requests for findings regarding specific uses and the extent thereof (CT 807-809) were denied (CT 836) (see Appendix). Judgment was thereafter entered granting the Ezells "an easement by prescription for the continual, present and future use, repair, maintenance and control of a fence and the property within said fenced area . . . [and] all of the significant items within the . . . fenced area (CT 79-80) (see Appendix). Eldridge timely appealed from that judgment (CT 82-84).

The Opinion of the Court of Appeal.

Viewing the appeal as, essentially" a challenge to "the sufficiency of the evidence," the court of appeal affirmed (Op., p. 8). The court recognized (1) that Eldridge had raised the purely legal question whether such extensive use as granted to the Ezells could be acquired only by adverse possession and (2) that the California Supreme Court had noted, but not

passed upon, that question in *Gilardi v. Hallam*.[12]

Nonetheless, observing that "the Ezells, use of Eldridge's property was extensive and specific," the court opined that the easement granted to the Ezells was not "the equivalent of ownership" (Op., pp. 15, 16).

Although, in this case the court made a determination regarding ownership, it did not fully clarify the constitutional issue of de facto "taking" in the context of diminution and usurpation of the property rights of Eldridge. (see Appendix; Op., pp. 16, 17).

Eldridge's timely petition for rehearing was denied (see Appendix). On subsequent petition to the Supreme Court of the State of California review was denied.

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12 *Gilardi v. Hallam*, supra, 30 Cal.3d at 327 (Op., pp. 11-12).

ARGUMENT

Petitioner contends that under the Fifth and Fourteenth Amendments to the United States Constitution, a "taking" of private property can be the result of a judicial act such as the granting of an easement; and that such action must be set aside in the absence of "just compensation" from the state or from the unjustly enriched recipient of the property.

It is submitted that the courts by declaration, and the state legislature by statute, have no more latitude for a declaratory "taking" for private use than they would have under a "taking" for public use. And since the courts and legislatures do not have such latitude, they should be limited in the quality and quantity of property which may be transferred by statutory prescriptive fiction in the absence of "just compensation."

A court may not grant unlimited right to exclusive possession and use of an entire parcel (see Op., p. 6) of private real property, when such right deprives the recorded fee owner of all economically beneficial uses, and is contrary to reasonable, investment-backed expectations of such real property, in the absence of "just compensation." In this case the evidence indicates a property value of approximately $225,000.

There must be a limit to the permissible amount of judicial reallocation of private real property which may be ordered without "just compensation." And where adverse possession is not established, the grant should necessarily fall short of depriving the record owner of all economically beneficial uses, and should not be contrary to reasonable, investment-backed expectations of such real property.

Further, a court claiming to sit in equity, or a state legislature by statute, should not be permitted to reward intentional illegal trespass with a grant of a prescriptive property estate, particularly without "just compensation."

The Court must consider the enforcement of constitutional limitations in light of the finite supply and increasing value of real property in the United States, and specifically in such urban areas as Los Angeles. Failure to address and control this explosive field will necessarily result in increasing inequities and caseloads.

The law of prescriptive rights in land has never been clear, and has been the cause of innumerable unnecessary lawsuits in this country. In some cases, the disputes are matters of mere inches, in other cases, such as this one, they can encompass entire legal parcels of land.

If the courts of equity were to continue to preserve the right to maintain prescriptive uses, but enforce the constitutional requirement for payment of "just compensation," the number of frivolous, nuisance, and nominal easement cases would be dramatically reduced. Those with serious and substantial uses would be protected from forced removal or denial of access. At the same time, the specter of "just compensation" would discourage claims for frivolous, nuisance and nominal uses.

Historical Perspective - Conflicting Laws

Originally, prescriptive easements were based on a fictional rationale developed by English courts willing to indulge in a presumption of the lost grant.[13]

They explained that if a party could establish a long-term, unauthorized use of another's property, it was proper to presume that the use rights had at one time been established through the grant of an easement. The inability to produce evidence of the actual grant was excused by creating a fiction that the grant had been lost.[14]

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13 *RKO-Stanley Warner Theaters, Inc. v Mellon Nat'l Bank & Trust Co.* 436 F.2d 1297 (3rd Cir. 1970); *Drennen v County of Ventura* (1874) 38 Cal.App.3rd 84, 112 Cal. Rptr. 907.

14 Holdsworth, Development of Modern Land Law, 279-86 (1927).

Today, most jurisdictions in the United States have abandoned the lost grant rationale. In its place they have recognized a doctrine of adverse user developed as a direct analogy to the principles of adverse possession.[15]

However there are jurisdictions such as Maine[16] where the presumption of permissive use still exists as a basis for prescriptive rights. Showings of acquiescence by the record owner are elements necessary to establish prescriptive rights. Conversely, in the majority of jurisdictions, the element of permissive use is a complete bar to the perfection of a prescriptive claim. We thus reach our first major inconsistency in the laws between the states.

If one analyzes the original concept of prescriptive rights, i.e. a presumption of grant, the Maine rule would be far more consistent with equity than the majority rule which rewards a trespass. The Maine rule would seem constitutionally consistent in making implied findings of the intent to grant (notwithstanding the Statute of Frauds) and perfect an unwritten estate on behalf of a claimant. But, in equity it is constitutionally inconsistent to use hostile and illegal conduct as a fictional device to "take" property from a rightful record owner without "just compensation."

While prescriptive easement is analogous to adverse possession, there is a difference in the estates resulting from the application of the two principles. The most troublesome aspect of adverse use prescription is the notion that a record owner's rights in property somehow have a statutory expiration date. If the record owner fails to defeat a use in the statutory period, it somehow ripens into an estate, which, however nominal in value to the holder, may have the effect of taking away most or all beneficial use of the property by its true owner.

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15 *Orange Blossom Hills, Inc. v Kearsley,* (Fla. Dist. Ct. App. 1974) 299 So.2d 75; *Bridle Trial Ass'n v O'Shanick* (Mo. Ct. App. 1956) 290 S.W.2d 401; *Plaza v Flak* (1951) 7 N.J. 215 81 A.2d 137.

16 *Dartnell v Bidwell* (1916) 115 Me. 227, 98 A. 743.

A great deal of unnecessary litigation results from nominal users filing frivolous, nuisance and trivial suits against record owners. Vast amounts of judicial time and resources are spent arguing over encroaching vegetation, footpaths, parking, storage, and the like. In many cases these elements are so incidental or intermittent as to be undetectable. Yet mere proof of their existence is uniformly found to be "open and notorious."

The law as currently interpreted seems to mandate more than just the contractual purchase and statutory recording of ownership of real property. It seems impliedly to require that you and your predecessors fence out all of your neighbors, and that you monitor your property 24 hours per day. For who knows? . . . some nocturnal encroacher may wish to visit the property once a month to stand the high ground and bay at the moon. In many cases, the record owner is a hapless soul who simply does not wish to be a bad neighbor, or does not have the desire or ability to fence his property.

The courts' current posture fosters distrust, resentment and disputes among neighbors. It rewards dishonest conduct, invites perjury, and imposes unrealistic standards upon owners of real property. While the statutes of the states all generally favor a presumption that ownership gives the right to possession,[17] the unchecked development of the concept of adverse uses has, in fact, obliterated this presumption.[18]

In the instant case the estate granted by the trial court is tantamount to title by adverse possession. The encroaching neighbor, Ezell is granted in excess of a complete legal

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17 See California Evidence Code §662: "The owner of the legal title to property is presumed to be the owner of full beneficial title. This presumption may be rebutted only by clear and convincing proof."

18 [But see M. Horowitz, "The Transformation of American Law" 31-66, 101-08 (1977)]. Judicial reshaping of property rights is nothing new, but today the courts appear to be overriding common law precedents at a greater pace than ever before. [M. Eisenberg, The Nature of the Common Law 135-36 (1988)]

residential lot, for all purposes, and to the complete exclusion of petitioner Eldridge. Given that Eldridge is left with only bare title, his beneficial ownership in the property has a value of less than zero. He has potential ownership liability for land over which he has no control and from which he can derive no benefit. He is thus left with no reasonable alternative other than to surrender title to the easement holder. The property would have no market value -- for what other sane person would want such a liability?

When the elements of adverse possession are met, the record title owner loses more that the right to bring an action; title is also lost. What has been awarded in this case is the equivalent of adverse possession, yet without meeting the statutory criteria for adverse possession. It is thus a judicial "taking."

What Constitutes a "Taking"

A finding that a "taking" has occurred can be based upon questions of deprivation. "Taking" within the Fifth Amendment included not only substitution of ownership but deprivation of ownership, including damage to, depreciation in value of, and destruction of property.[19]

In *Lucas v. South Carolina Coastal Council* Justice Scalia wrote that "When the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good" he must be compensated for his loss.[20] This provides a workable criteria for determining what constitutes deprivation of property rights.

This concept is further expanded in the concurring opinion of Justice Kennedy writing that a key test of compensation is whether the deprivation of property "is

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19 U.S.C.A. Const. Amend. 5; *U.S. v General Motors Corp.* 65 S.Ct. 357, 323 U.S. 373, 89 L.Ed. 311, 156 A.L.R. 390

20 *Lucas v. South Carolina Coastal Council* (1992) 92 Daily Journal D.A.R. 9030

contrary to reasonable, investment-backed expectations" by the property owner.[21] Because of the total abrogation of Eldridge's rights to possession and control, these standards are easily applied here.

The judicial focus on the quantum of loss as a test of a "taking" is called the "diminution of value thereof" and was put forward many years ago by Justice Oliver Wendell Holmes in *Pennsylvania Coal Co. v Mahon.*[22] There is no clear line, Holmes believed, between the formal taking of property by government (in which title and possession are acquired) and the various forms of government regulation, which do not transfer ownership formally, but restrict private owners' uses and values for the benefit of the general public.

Although the instant case does not emanate from a regulatory "taking," the diminution standard set forth by Justice Holmes would clearly apply. There is, for all practical purposes, nothing left of the Eldridge estate in the property. This, as a result of the actions of the California court.

The Fifth Amendment provides that "private property [shall not] be taken for public use without just compensation." The Fifth Amendment bar on taking of private property without just compensation has been held applicable to the states under the Fourteenth Amendment.

"Taking" for Private Use is Never Appropriate

Note that the "taking" must be for public use, which is broadly defined. However, private property may not be appropriated by government at all, if not for public use . . . even if just compensation is paid.

John Locke, one of the intellectual sources of our freedom, argued that property rights exist before, and hence

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21 *Id.* 92 Daily Journal D.A.R. 9030.

22 *Pennsylvania Coal Co. v Mahon* (1922), supra 260 U.S. 393.

independent of government. Their preservation is "the great and chief end" for which governments are founded. Locke's idea was repeated in the Declaration of Independence

"Judicial Taking"

To protect property from "takings" by the executive and legislative branches of the government, and allow unlimited action by the judiciary is improper. How safe is a man accosted by 40 thieves if 39 are restrained and only the 40th snatches his purse. He is nonetheless robbed of his property.

The courts, while shoring up private property rights against police and regulatory powers, have been reluctant to accept any limitations on their own judicial powers

There is, however, legal footing for this Court to question the improper or excessive application of statutes by the courts. This includes otherwise routine declaratory actions of the courts affecting estates in property.

The Supreme Court, in its 1897 decision in *Chicago, Burlington & Quincy Railroad v. City of Chicago,*[23] unanimously concluded that Due Process Clause of the Fourteenth Amendment incorporated the takings protections. In the same case, moreover, the Supreme Court held that the "takings" protections applied to the courts.[24]

The comparatively liberal authority of the United States Bankruptcy Court's power was successfully challenged under the Fifth Amendment's prohibition against "taking" private property "without compensation" in the 1982 case of *U.S. v. Security Indus. Bank.*[25]

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23 *Chicago, Burlington & Quincy Railroad v. City of Chicago* (1897) 166 U.S. 226.

24 *Id.* at p. 233-35.

25 U.S.C.A. Const.Amend. 5. -- *U.S. v. Security Indus. Bank*, 103 S.Ct. 407, 459 U.S. 70, 74 L.Ed.2d 235

The Bankruptcy Court refused to improperly apply a statute which would abrogate a private lien. Reasoning that the lien was indeed private property, and that its invalidation would have constituted a "taking," this Court concurred with the affirmation of the Tenth Circuit Court of Appeal that such an application of the law would have violated the "Takings Clause" of the Fifth Amendment."

In the *U.S.* case the estate was a mere chattel mortgage on personal property. The Court determined that deprivation of the mortgagee's lien right would have been a "taking," stating in part:

> . . . that § 522(f)(2) effects a "complete taking of the secured creditors' property interests," and is thus invalid under *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 [*74] (1935). The United States appealed, and we noted probable jurisdiction. 454 U.S. 1122 (1981).[26]

Although the statute provided for rejection of the lien by the trustee or by a subsequent purchaser, the Court held that the Fifth Amendment protection superseded the statute as it was to be applied.

The *U.S.* Court equated the bankruptcy court's action with "governmental action" which "result[ed] . . . in a complete destruction of the property right of the secured party,"[27] In the instant case, all of petitioner Eldridge's rights and interest except bare title have been taken from him by the action of the court. The *Penn Central*[28] and *PruneYard*[29] cases cited in *U.S.* are analogous situations where governmental action affected some but not all of the "bundle of rights" which constitute the "property" in question. In *U.S.* the Court is

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26 *U.S. v. Security Indus. Bank*, supra, 459 U.S. 70, at p.673; 103 S. Ct. 407, at p. 409;

27 *Id.* 459 U.S. 70, at p.75; 103 S. Ct. 407, at p.410.

28 *Penn Central Transportation Co. v. New York City,* (1978) 438 U.S. 104

29 *PruneYard Shopping Center v. Robins*, (1980) 447 U.S. 74.

taking great strides to protect a "bundle of rights" which is admittedly smaller than that which accrues to an owner in fee simple, as is the case here.

The Court went on to suggest that if the public interest requires . . . the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain.[30]

In the *Hawaii Housing Authority* case, Justice O'Connor wrote that "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."[31] Following this logic, the appropriation of the Eldridge property for the enrichment of Ezell, is clearly constitutionally void, even if compensation had been provided.

"State" Action Defined

By analogy, constraints on "state" action have been applied to judicial decisions in a number of non-taking contexts. As a result, the Fifth Amendment, at least on its surface appears to be equally applicable to judicial actions which result in a "taking."[32]

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30 *Id.* 459 U.S. 70, at p.77; 103 S. Ct. 407, at p.412.

31 *Hawaii Housing Authority v Midkiff*, (1984) 104 S.Ct. 2321, 467 U.S. 229, 81 L.Ed.2d 186, on remand *Midkiff v Tom*, 740 F.2d 15 -- U.S.C.A. Const.Amends. 5, 14; HRS §516-1 et seq.

32 76 Va. L. Rev. 1449, 1456; See Barnett, What Is "State" Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?, 24 Or. L. Rev. 227, 131-32 (1945). The Fourteenth Amendment has been applied to invalidate not only state judicial decisions that violated the traditional constitutional constraints on federal courts, but also those that discriminated on the basis of race, see, e.g., *Shelley v Kraemer,* (1948) 334 U.S. 1, 16-18; interfered with freedom, see, e.g. *Cantwell v Connecticut* (1940) 310 U.S. 296, 306; Violated free-speech rights, see, e.g., *Bridges v California* (1941) 314 U.S. 252, 266-68; and retroactively applied a newly created common-law crime, see, e.g., *Bouie v City of Columbia* (1964) 378 U.S. 347, 353-54.

The United States Supreme Court's reluctance to apply the takings protections to the courts proves particularly puzzling when one compares the Court's treatment of these other constitutional restrictions that, unlike the takings protections, are essentially noneconomic. The Supreme Court has unhesitatingly extended most of the noneconomic restrictions of the Constitution to judicial actions, even in the face of express constitutional language to the contrary.[33]

Overriding Federal Question of Property Rights

There has been considerable argument that property questions should be left to the discretion of state courts. The application of constitutional limitations in the "taking" of property is, however, inescapable. In *Hughes v. Washington*[34] the United States Supreme Court held that ownership was an issue of federal, not state, law. In that particular case federal law awarded an accretion to the plaintiff Mrs. Hughes.

The Court has, unfortunately, declined subsequent offers to revisit the issue. In *Bonelli Cattle Co. v. Arizona*,[35] the Court embraced the concurring language of Justice Steward in *Hughes* agreeing that the "Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature."[36]

Numerous lower courts have confronted the issue of judicial taking,[37] including two Ninth Circuit cases which ruled

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33 76 Va. L. Rev. 1449, 1456 (supra).

34 *Hughes v. Washington* (1967) 389 U.S. 290.

35 *Bonelli Cattle Co. v. Arizona* (1973) 414 U.S. 313.

36 *Bonelli Cattle Co. v. Arizona* (1973) supra, 414 U.S. 313.

37 See, e.g., *Bott v. Natural Resources Comm'n*, (1982) 415 Mich. 45, 77-86, 327 N.W.2d 838, 849-53; *Dolphin Lane Assocs. v Town of Southampton* (1971) 72 Misc.2d 868, 876, 339 N.Y.S.2d 966, 975; *State v. Corvallis Sand & Gravel Co.* (1977) 283 Or. 147, 165, 583 P.2d 1352, *Hawaii v. Zimring* (1977) 58 Haw. 106, 161, 566 P.2d 725, 756; *Van Ness v. Borough of Deal* (1978) 78 N.J. 174, 185-89, 393 A.2d 571, 577-78.

that judicial takings had occurred.[38]

Limitation of Easements

Fifty years ago, the California Supreme Court observed that an "'exclusive easement' is an unusual interest in land," noting that "it has been said to amount almost to the conveyance of the fee."[39] Since then, the courts of appeal have struggled with the rules applicable to such "unusual" interests. One such decision is *Raab v. Casper,*[40] in which the court noted that,

> "As the difference between prescriptive use and adverse possession is sometimes obscure, so is the difference between an exclusive easement and outright title. . . . An exclusive interest labeled easement, may be so comprehensive as to supply the equivalent of an estate, i.e., ownership."[41]

Another pertinent decision is *Mesnick v. Caton.*[42] The court of appeal, rejecting the claim of a prescriptive easement, stated that:

> "An easement is a restricted right to specific, limited, definable use or activity upon another's property, which right must be less than the right of ownership. It is difficult to see how defendant's claim to use of plaintiff's property, given the facts of this case, differs from occupancy, or ends short of possession."[43]

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38 *Robinson v. Ariyoshi* (9th Cir. 1985) 753 F.2d 1468, vacated, (1986) 477 U.S. 902.

39 *Pasadena v. California-Michigan Etc. Co.* (1941) 17 Cal.2d 576, 578.

40 *Raab v. Casper* (1975) 51 Cal.App.3d 866.

41 *Id.* 51 Cal.App.3d at p. 876.

42 *Mesnick v. Caton* (1986) 183 Cal.App.3d 1248.

43 *Id.* 183 Cal.App.3d at p. 1261.

Contract Clause

Petitioner further argues that any and all of the above actions violate the "Contracts Clause" of the United States Constitution, in that they impair the obligation of contracts, both between individuals and between an individual and the state.[44]

Due Process

In the absence of an eminent domain (or "private domain") proceeding, the above actions constitute a violation of the rights of the property owner (petitioner) to due process, prior to the deprivation of his lawful right, title, and interest, as guaranteed by Fifth and Fourteenth Amendments to the United States Constitution.

Statutory Compliance

In the absence of proof sufficient to establish title by adverse possession, a party may not be granted a prescriptive easement for "continual, present and future use and control" of an entire legal parcel, (see Op., p. 6) to the complete exclusion of all, including the owner of the fee estate.

CONCLUSION

The California Court of Appeal, themselves, seemed to invite further review and ultimate guidance in this case with their statement that:

> . . . we feel compelled to note our uneasiness with the application of prescriptive easement law to these facts. Although the result in this case is legally and factually inescapable, the well-established rules governing prescriptive easements arose in a context

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44 *Muhlker v New York & Harlem Railroad* (1905) 197 U.S. 544 (McKenna, J., plurality opinion) holding both a taking and an impairment of contractual rights flowing from deeds to the property.

> other than the present reality of expensive real estate in crowded urban settings. We think it unjust that one landowner can usurp extensive use of another's property without paying taxes on the land and without recording the fact, thus deceiving subsequent buyers like Eldridge. (Op., p. 16)[emphasis added]

The judicial action in this case resulted in a "taking" of an entire legal lot (plus large portions of a three others) from petitioner Eldridge, without "compensation." The land was then given to respondent Ezell for perpetual use and control to the total exclusion of Eldridge. The statutory scheme of the State of California, the associated case law, and the judicial application of the facts in this case amount to a "taking" . . . without compensation as proscribed by the Fifth and Fourteenth Amendments to the United States Constitution.

For the foregoing reasons, petitioner respectfully request that review be granted.

Dated: Sherman Oaks, California, August 17, 1992.

ROBERT L. SCOTT
ROBERT L. SCOTT, LAW OFFICES

By _____
Robert L. Scott
Attorney for Plaintiff,
Cross-Defendant and
Petitioner Anthony Eldridge

APPENDIX

Appendix A
Decision/Opinion of Court of Appeal

Appendix B
Application for Rehearing
Denial of Rehearing

Appendix C
Petition for Review
Denial of Review

Appendix D
Judgment of the Trial Court

Appendix E
Statement of Decision

Proof of Service
[Loose]

DECISION/OPINION OF COURT OF APPEAL

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION ONE

ANTHONY ELDRIDGE, Plaintiff, Cross-Defendant and Appellant, v. LOUIS C. EZELL, et al., Defendants, Cross-Complainants and Respondents.	) No. B041536) (Super. Ct.) No. C 615510)))) COURT OF APPEAL) SECOND DISTRICT) FILED) MAR 4 1992))))

APPEAL from a judgment of the Superior Court of Los Angeles County. James Reese, Judge. (Retired judge of the superior court sitting under assignment by the Chairperson of the Judicial Council.) Affirmed.

Robert L. Scott for Plaintiff, Cross-Defendant and Appellant.

Russell J. Thomulka for Defendants, Cross-Complainants and Respondents.

Plaintiff/cross defendant Anthony Eldridge (Eldridge) appeals from the judgment entered following a court trial granting defendants/cross complainants Louis C. and Susan Ezell (the Ezells) a prescriptive easement over some of Eldridge's property. We reject Eldridge's claim of evidentiary insufficiency and affirm.

FACTS

On July 23, 1975, the Ezells bought a house and land located at 8540 Cole Crest Drive in the Hollywood hills. The Ezells' property consisted of three lots. On October 18, 1985, Eldridge bought adjacent unimproved land consisting of nine lots forming an L to the north and west of the Ezells' property. Both properties overlook Sunset Boulevard and have panoramic views of the Los Angeles basin. The Ezells' predecessors began a series of encroachments on some of Eldridge's predecessors' property. The Ezells maintained and expanded these encroachments. Eldridge does not dispute the encroachments' existence, but challenges the timing of their construction and the extent of the prescriptive easement.

John Fulton owned the Ezells' property from 1951 to 1969. During the 1950's, Fulton built a driveway, pool, concrete pool decking, and fencing which encroached on what later became Eldridge's property. Fulton visited the property shortly before trial and found these encroachments in the same

condition and location as when he owned the property. Violet and Donald Wightman and Leslie Nielson, former owners of Eldridge's property, confirmed the existence of the pool, concrete pool decking, and driveway since the 1970's, but claimed much of the current fencing, landscaping, irrigation system, retaining wall, and concrete steps were added after 1982. Frank Devine and Gary Morgan, long-time neighbors of the parties and their predecessors, saw portions of the fence and landscaping in their present location and condition in, respectively, 1976 and early 1981.

Surveyors Charles Matthews and Louis Zehfuss surveyed the encroachment area in, respectively, 1986 and 1987. Matthews inspected the property shortly before and during trial. According to Matthews and Zehfuss, a comparison of the surveys and the trial inspection demonstrated that the encroachment area was enlarged between 1986 and 1987, and again between 1987 and trial, by moving, repairing, expanding, and straightening the fences. According to aerial photographers John Mitchell, Philippe Breakman, and Arthur Trinkle, a comparison of aerial photographs taken in 1978, 1981, 1983, and 1986 with the property in October 1988 demonstrated that a pool house, and much of the landscaping and fenced area was added after 1981.

Marlon Theilacker sold the Ezells a canvas awning for their pool house and installed it in August 1980. Roofing

contractor Sandor Jenei installed a roof on the pool house in 1981. Theilacker and Jenei confirmed that the pool house was in the same location and condition about a month before trial as when they worked on it.

Steward Howland helped build the jacuzzi, gazebo, wooden pool decking, and roof in June and July 1981. Howland saw the Gunite retaining wall, fence, and concrete hill steps while working for the Ezells in 1981, and stated that all the encroachments he worked on and saw in 1981 were in the same location and condition shortly before trial.

Terry Ratfield helped the Ezells excavate the pool house location, repair fences and irrigation systems, and build hillside steps in 1977 and 1978. He saw the Gunite retaining wall and wooden pool decking during the summer of 1981. Ratfield agreed these encroachments were in the same condition shortly before trial as they had been in 1977-1981.

Eldridge testified he saw the property in 1981 and the only encroachments on the property he later purchased were the pool and filter, a few nearby trees, a small trash can enclosure, and a portion of the driveway. Eldridge claimed there were no fences or landscaping on his property until 1985, and they were expanded constantly until the trial. Ezell admitted moving some of the fences after the lawsuit was filed, but claimed the changes were part of an eventually unsuccessful settlement attempt. Ezell also admitted that

some of the encroachments were built without relevant permits. The parties agreed that Ezell never paid taxes on any of Eldridge's property.

On September 5, 1986, Eldridge sued the Ezells for injunctive and declaratory relief, trespass, quiet title, and punitive damages, seeking removal of the encroachments, extinguishment of any interest by the Ezells, a declaration that Eldridge was entitled to undisputed ownership, possession, and use of all his property, and damages. The Ezells cross-complained for declaratory and injunctive relief, trespass, invasion of privacy, specific performance, agreed boundary, and quiet title, seeking, alternatively, possession and ownership by agreed boundary or adverse possession, or use by prescriptive easement over the disputed area.

On November 3, 1988, with the parties' consent, the trial court, the parties' attorneys, and Eldridge's surveyor inspected both properties. The court was unable to view two points "because of the steepness." The parties also stipulated to the legal description offered by Matthews of the area claimed by the Ezells, which corresponded to the area fenced as of the court inspection date.

On November 21, 1988, the trial court issued an "Announcement of Tentative Decision." After a hearing regarding Eldridge's request for a statement of decision and objections to the tentative decision, the trial court issued

its statement of decision on March 20, 1989. The trial court made the following findings:

1) Since the Ezells' July 23, 1975, purchase of the property, they "continuously, openly and notoriously occupied, used and possessed" a portion of Eldridge's property consisting of one described lot and specifically described portions of three other lots (the easement)1/;

2) The Ezells' predecessors in interest built the fences surrounding the easement in 1951 and the swimming pool, pool equipment, and concrete decking within the easement in 1960;

3) When the Ezells bought their property, the easement also included a driveway providing access to their home, a garbage container enclosure, and landscaping, the Ezells knew the easement and its existing improvements encroached on their neighbor's property, they intended to establish and maintain a prescriptive easement over the disputed property, and they maintained the existing improvements: since their purchase;

4) Before September 1, 1981, the Ezells built a pool shed, redwood pool deck, concrete steps, and retaining wall within the easement, and maintained them through trial;

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1. The easement corresponded to the area described by Matthews and fenced and developed by the Ezells as of the court inspection date.

5) All improvements within the easement, "including but not limited to fences, the pool, pool equipment, pool house shed, concrete and redwood decking, concrete retaining walls, wood and concrete steps, blacktop driveway, and landscaped gardens, trees and shrubs, were initially installed, and or planted by [the Ezells] and/or their predecessors more than 5 years prior to September 5, 1986; that the same were maintained continuously in their same condition for a period in excess of 5 years prior to September 5, 1986[,] and up to time of trial with the knowledge of, but without the consent and/or authorization of [Eldridge]";

6) The Ezells "are the owners of an easement by prescription for the continual, present and future use, maintenance and control of all of the items within the fenced [easement], including, but not limited to, fences, the pool, pool equipment, pool house, concrete and redwood decking.. concrete retaining walls, wood and concrete steps, blacktop driveway, landscaped garden, trees and shrubs," and Eldridge "is the owner of the underlying fee interest in the [easement] subject to the prescriptive easement of the [Ezells]"; and

7) "[P]ursuant to stipulation, both parties [are] ordered restrained from molesting, harassing, threatening', or interfering with one another in any manner whatsoever or coming to or upon the property of the other party and that neither party shall utilize the street in front of the other's

property for other than usual and ordinary travel."

The trial court also found that Eldridge's "request 'that findings of fact and conclusions of law be provided on the issues controverted at trial' is in fact a request for a statement of decision stated in terms of numerous evidentiary facts, not ultimate facts, and therefore must be respectfully declined."

ISSUE

Eldridge makes numerous claims of error, all of which essentially challenge the sufficiency of the evidence. Preliminarily, Eldridge claims the trial court's failure to view the entire area deprives the inspection of its usual evidentiary value, and the failure to render a more specific statement of decision deprives the judgment of its presumptive validity. Then, Eldridge argues that the evidence does not support the trial court's findings of the prescriptive easement or its boundary. As part of that argument, Eldridge contends the judgment. essentially awards the Ezells title by adverse possession, a finding also unsupported by the evidence. Finally, assuming evidentiary insufficiency, Eldridge contends the evidence supports judgment in his favor.

DISCUSSION

"The elements necessary to establish a prescriptive easement are well settled. The party claiming such an easement

must show use of the property which has been open, notorious, continuous and adverse for an uninterrupted period of five years. [Citations.] Whether the elements of prescription are established is a question of fact for the trial court [citation], and the findings of the court will not be disturbed where there is substantial evidence to support them." (Warsaw v. Chicago Metallic Ceilings, Inc. (1984) 35 Cal.3d 564, 570; Mesnick v. Caton (1986) 183 Cal.App.3d 1248, 1260.) "Although the trial court's finding of the existence of a prescriptive easement must be based upon clear and convincing Evidence, if there is substantial evidence to support its conclusion, the determination is not open to review on appeal. [Citation.] The usual rule of conflicting evidence is applied, giving full effect to respondents' evidence, however slight, and disregarding appellant's evidence, however strong. [Citations.]" (Applegate v. Ota (1983) 146 Cal.App.3d 702, 708.) In determining the existence and scope of a prescriptive easement, "[t]he trier of fact's view of an area is independent evidence which can be considered by him in arriving at his conclusion and is substantial evidence in support of findings consonant therewith. [Citations.]" (Id. at p. 712.)

Eldridge's contention that the evidence is insufficient to support the judgment lacks merit. Numerous eyewitnesses testified that all the encroachments existed in

their present condition before the five-year period began preceding Eldridge's filing suit, and that the easement boundary defined by the present fence location and found by the court existed for the same period. The trial court's inspection of the property corroborated this evidence. Although this testimony was contradicted and perhaps outweighed by Eldridge's survey and aerial photograph evidence, on appeal we cannot reweigh the evidence and substitute our judgment regarding its respective weight for that of the trial court. "The principles of review which must guide us are elementary. . . . [A] 'reviewing court is without power to substitute its deductions for those of the trial court.' More recently, [we]. . . . emphasized that 'In resolving the issue of the sufficiency of the evidence, we are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment . . . . "In brief, the appellate court ordinarily looks only at the evidence supporting the successful party. and disregards the contrary showing." [Citation.] All conflicts, therefore, must be resolved in favor of the respondent.' [Citations.]" (Campbell v. Southern Pacific Co. (1978) 22 Cal.3d 51, 60; Warsaw v. Chicago Metallic Ceilings, Inc., supra, 35 Cal.3d at p. 570; Mesnick v. Caton, supra, 183 Cal.App.3d at p. 1260.) While we might have given greater weight to Eldridge's survey and aerial photograph evidence, the

Ezells' eyewitness evidence is not inherently unbelievable or logically impossible. Thus,' apart from the trial court's inspection of the property, sufficient evidence supports the judgment and the trial court's findings. No further factual findings were required.

Eldridge contends that because the judgment grants the Ezells exclusive and unlimited possession and use of the area within the prescriptive easement, it essentially and improperly awards them title under adverse possession. "The elements necessary to establish title by adverse possession are tax payment and open and notorious use or possession that is continuous and uninterrupted, hostile to the true owner and under a claim of title. [Citations.] A prescriptive easement requires establishment of the same elements except that payment of taxes is required only if the easement has been separately assessed. [Citations.]" (Gilardi v. Hallam (1981) 30 Cal.3d 317, 321-322.) The parties agree that the Ezells never paid taxes on the land or improvements within the prescriptive easement, and thus are not entitled to adverse possession of the disputed property. Eldridge then argues that a prescriptive easement cannot entail exclusive and unlimited possession and use of another's property, which may be acquired only by adverse possession. Eldridge concludes that, since the Ezells concededly are not entitled to adverse possession, they cannot acquire the equivalent control of the disputed property

by prescriptive easement.

In Gilardi v. Hallam, supra, 30 Cal.3d 317, the defendants' predecessors, owners of a lakeside home and lot, improved a portion of the plaintiffs' adjoining unimproved lot by installing a sidewalk, sprinklers, trees, and lawn. The defendants never paid taxes on the improvements or underlying land. The trial court quieted the plaintiffs' title to their entire lot, rejecting the defendants' adverse possession and prescriptive easement claims to the disputed area. (Id. at pp. 320-321.) the Supreme Court agreed that the defendants' "failure to pay taxes bars the[ir] claim of title by adverse possession," but reversed because "the lack of tax payment would not bar claim of prescriptive easement." (Id. at p. 327.) The Court declined to address Eldridge's contention: "The parties have not briefed the questions whether a prescriptive easement for maintenance of landscaping would be the equivalent of a fee interest, whether such an interest may be obtained in the absence of tax payment [citation], and whether the size of trees or bushes should be limited to their smallest size during the prescriptive period [citation]. Accordingly, we do not address those questions." (Ibid.)

The only authority cited by Eldridge in support of his argument is Mesnick v. Caton, supra, 183 Cal.App.3d 1248. However, that case is distinguishable and, in any event, does not support Eldridge's position. Mesnick and Caton owned

adjoining lots acquired, respectively, in 1978 and 1971. A dilapidated fence, erected in 1955, stood between the lots. In December 1980, as part of improvements to his lot, Mesnick hired a surveyor who discovered that the fence was entirely on Mesnick's lot, reducing it, and expanding Caton's lot, by 319 square feet. When Caton refused to relocate the fence to the true boundary, Mesnick successfully sued to quiet his title to his entire lot, extinguishing all Caton's claims to the disputed property.

We affirmed, rejecting, among others, Caton's claims that he was entitled to control of the disputed property under either adverse possession or a prescriptive easement. First, in discussing adverse possession, we noted that "Gilardi[v. Hallam, supra, 30 Cal.3d 317] has phrased two of these elements as 'open and. notorious use or possession. . . .' . . . [T]he 'use or possession' phrase [drew] attention to the similarity between elements necessary to prescriptive easements and those necessary to adverse possession. . . . Quoted out of context, however, the phrasing 'use or possession' obscures an important distinction. Use pertains solely to easements, while possession applies only to adverse possession. [Citation.]" (Mesnick v. Caton, supra, 183 Cal.App.3d at p. 1259, fn. 1.) We affirmed the trial court's rejection of adverse possession because Caton neither hostilely occupied nor paid taxes on the disputed property.

Second, in rejecting Caton's prescriptive easement claim, we stated: "The elements necessary for a prescriptive easement resemble those necessary for adverse possession, but the doctrines are not identical nor are their prerequisites interchangeable. A successful claimant by adverse possession, for instance, gains title to property. By contrast, the successful claimant of a prescriptive easement gains not title, but the right to make a specific use of someone else's property. [Citations.] [Para.] Occupancy with claim of possession and title thus remains quite different from restricted, partial, or intermittent use. 'An easement involves primarily the privilege of doing a certain act on, or to the detriment of, another's property.' (Italics added.) [Citations.] [If]. . . . [Caton] did not show what, if any, use he made of the disputed property. Some shrubbery grew on both sides of the fence. However, [Caton] did not claim the disputed property was necessary for drainage, crops, recreation, transportation, ingress and egress, or other activity which has been found to be a basis for a prescriptive easement. [Caton] did not maintain the fence, and its mere construction does not create an easement. [Citation.] It seems neither logical nor just that disuse and inactivity should belatedly qualify [Caton] for a prescriptive easement over [Mesnick's] property. [Para.] Moreover, lack of use not only prevents a prescriptive easement from arising, it precludes its enforceability. The character of use determines

an easement's scope. [Citations.] [Para.] Lack of use thus makes it impossible to describe with any specificity the right [Caton] would have over [Mesnick's] land even if he owned an easement. An easement is a restricted right to specific, limited, defineable [sic] use or activity upon another's property, which right must be less than the right of ownership. It is difficult to see how [Caton's] claim to use of [Mesnick's] property . . . differs from occupancy, or ends short of possession." (Mesnick v. Caton, supra, 183 Cal.App.3d at p. 1261.)

Thus, Mesnick v. Caton, supra, 183 Cal.App.3d 1248, is factually distinguishable from this case. Unlike Caton, who made no improvements on or use of Mesnick's property, the Ezells erected decks, retaining walls, and structures, planted extensive landscaping, and built an irrigation system. Contrary to Eldridge's contention, the Ezells' use of easement for maintenance of landscaping, the decks, and Eldridge's property was extensive and specific. However, the easement for the maintenance of a landscaping, the decks, and existing structures does not equal ownership, as it does not permit the Ezells, for example, to build a residence or flood the entire easement area to create an artificial lake. The facts that some of the encroachments were built without the requisite permits, and that the growth of some of the landscaping may limit Eldridge's view from the remainder of his property, do not defeat the easement. (See Wolford v. Thomas (1987) 190 Cal.App.3d 347, 354-359.)

Moreover, the case does not support Eldridge's claim that a prescriptive easement cannot extend over an entire lot. Ezell's easement covers only a small portion of Eldridge's entire property holding. The fact that all of one lot comprising a portion of Eldridge's holding is subject to the easement does not defeat the claim. In contrast, Caton was denied a prescriptive easement because he had made no use of Mesnick's property, not because of the size of the area over which Caton sought the easement in proportion to Mesnick's entire holding. Thus, we reject Eldridge's contention that the easement is the equivalent of ownership.2/

Because we find the evidence sufficient to support the trial court's findings and judgment, we need not address Eldridge's remaining contentions. However, we feel compelled to note our uneasiness with the application of prescriptive easement law to these facts. Although the result in this case is legally and factually inescapable, the well established rules governing prescriptive easements arose in a context other than the present reality of expensive real estate in crowded urban settings. We think it unjust that one landowner can usurp extensive use of another's property without paying taxes on the land and without recording the fact, thus deceiving

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2. The Ezells' reliance on Holmes v. Harlan (1982) 138 Cal.App.3d 209 on this issue is misplaced. A petition for rehearing was granted January 14, 1983, and the court's final opinion on rehearing was not certified for publication.

subsequent buyers like Eldridge. As these legal principles are well established, however, we think any change can be initiated only by the Legislature.

DISPOSITION

We affirm the judgment. The parties are to bear their own costs.

NOT TO BE PUBLISHED.

ORTEGA, J.

We concur:

SPENCER, P. J.

DEVICH, J.

APPLICATION FOR REHEARING
IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

ANTHONY ELDRIDGE, *Plaintiff/Appellant,* vs. LOUIS C. EZELL, SUSAN EZELL, DOES 2 through 50, and ALL PERSONS CLAIMING BY, THROUGH OR UNDER SUCH PERSONS, AND ALL PERSONS UNKNOWN, CLAIMING ANY LEGAL OR EQUITABLE RIGHT, TITLE, ESTATE, LIEN, OR INTEREST IN THE PROPERTY DESCRIBED IN THE COMPLAINT, ADVERSE TO PLAINTIFF'S TITLE, OR ANY CLOUD ON PLAINTIFF'S TITLE THERETO, NAMED AS DOES 51 through 100, *Defendants/Respondents.*	APPEAL NO. B 041536 SUPERIOR COURT CASE NO. C 615510

APPEAL FROM THE SUPERIOR COURT
OF LOS ANGELES COUNTY
THE HONORABLE JAMES REESE (RET.), JUDGE

PETITION FOR REHEARING

PROPERTY "TAKEN" WITHOUT COMPENSATION

1. Although raised in the brief, the issue of compensation for the property was not addressed in the Court's decision.

2. It seems absurd that while the government is constitutionally denied the ability to "take" private property without compensation, that the judicial system should be permitted to enforce a "taking" and transferring of such property to private individuals without fair compensation to its true owner.

3. While this may be a case of first impression in this setting, it serves the best interests of public policy if those who seek easements by prescription are also required to pay a fair market value to the owner being dispossessed.

4. This protects the interests of the innocent improver and encroacher, and those who require easements by necessity; but does, at the same time, support the constitutional protection of property rights.

EASEMENT MUST BE LIMITED

5. Although raised in the Appellant's Brief, the issue of limitation or definition of the easement was not adequately addressed in the Court's decision. It is plaintiff's position that an easement may not be unlimited, but must be reasonably defined as to size and scope.

DENIAL OF REHEARING

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 1 DATE: 03/27/92

Law Offices
Robert L. Scott
15303 Ventura Blvd.
Suite #900
Sherman Oaks, CA. 91403

RE: Eldridge, Anthony

vs.

Ezell., Louis C. Et Al.
2 Civil B041536
Los Angeles NO. C615510

THE COURT':

Petition for rehearing denied.

APPLICATION FOR REVIEW

B041536

In the Supreme Court of the State of California

ANTHONY ELDRIDGE,
Plaintiff, Cross-Defendant and Appellant,

vs.

LOUIS C. EZELL, et al.,
Defendants, Cross-Complainants
and Respondents.

[Los Angeles County Superior Court No. C615510]

PETITION FOR REVIEW

After Decision by the Court of A Second Appellate District,
Division One, and Numbered Therein B041536
City and County of Los Angeles
The Honorable James Reese (Ret.), Judge

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Attorneys for Plaintiff,
Cross-Defendant and
Appellant

[Para.]

4. May the state, through its courts, constitutionally endorse2 the taking of private property rights by means of a prescriptive easement without payment of just compensation?[45]

[Para.]

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45 We recognize that this Court has rejected, over dissent, a claim for compensation in a prescriptive easement case (Warsaw vs. Chicago Metallic Ceilings, Inc. (1984) 35 Cal.3d 564, 574-575 and see dissenting opinion of Reynoso, J., at 35 Cal.3d 577-581). We also note that the award of the full use and control of an entire legal lot in an urban area is not, as the Court of Appeal recognized (Op., p. 16), what the doctrine of prescriptive easements was intended to accomplish. However, because of this Court's rejection of just compensation argument, we note the issue here to preserve the point, but we do not repeat the argument.

DENIAL OF REVIEW

Second Appellate District, Division One, No. B041536
S026126

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

ANTHONY ELDRIDGE, Appellant

v.

LOUIS C. EZELL Et Al., Respondents

SUPREME COURT
FILED
MAY 2 0 1992
Robert Wandruff
Clerk, Deputy

Appellant's petition for review DENIED.

LUCAS

Chief Justice

JUDGMENT OF THE TRIAL COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ANTHONY ELDRIDGE, Plaintiff, vs. LOUIS C. EZELL, SUSAN EZELL, et al., Defendants.	CASE NO. C 615 510 JUDGMENT

This case came on regularly for trial before this Court sitting without a jury on October 31, 1988, the Honorable James N. Reese, Judge (Retired), presiding; after completion of the trial on November 17, 1988, and the receipt by the Court of oral and written arguments of counsel, the matter was submitted for decision.

Throughout these proceedings, plaintiff and cross-defendant (hereafter plaintiff) was present and represented by Robert L. Scott, Esq; defendants and cross-complainants (hereafter defendants) were present and represented by Russell J. Thomulka, Esq.

[Page 1]

On November 21, 1988 this Court caused to be filed herein pursuant to CRC § 232 its Announcement of Tentative Decision.

Plaintiff duly filed his Request for Statement of Decision and Objections to Tentative Decision on November 29, 1988. Thereafter, on December 2, 1988, the Court directed counsel for defendants to prepare, file and serve a proposed Statement of Decision.

The proposed Statement of Decision, erroneously entitled "Findings of Fact and Conclusions of Law" was served on counsel for plaintiff on December 6, 1988 by defendants' counsel. Plaintiff's counsel duly filed objections to the proposed Statement of Decision and on January 27, 1989, the Court heard arguments by both parties on Plaintiff's Request and Objections and the matter was duly submitted.

The Court, having heard the testimony, examined the proof offered by the respective parties, after considering all the evidence, oral and written arguments and briefs presented or filed by both parties during, before and after the trial, and the Court having personally viewed the subject real property during the course of the trial in the presence of counsel and the parties pursuant to stipulation, the Court, being fully advised in the premises, now issues its Judgment as follows:

NOW, THEREFORE, IT IS ADJUDGED, ORDERED AND DECREED that:

1. As of September 5, 1986, the cross-complainants, LOUIS C. EZELL and SUSAN EZELL had established and are the owners of an easement by prescription for the continual, present and future use, repair, maintenance and control of a fence and the property within said fenced area, legally described as follows:

Lot 352, Tract No. 798, in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 16, Page 34 of Maps, in the Office of the Recorder of said County, and those portions of Lots 1, 493,and 494, Tract No. 865, in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 16, Page 97, in the Office of the Recorder of said County, lying southerly and easterly of the following described lines:

Beginning at the northwest corner of said Lot 352, thence south 83 degrees, 41 minutes, 00 seconds west, 34-64 feet, along the westerly prolongation of the northerly line of said Lot 352; thence south 14 degrees, 05 minutes, 42 seconds west 82.81 feet to a point in the southerly line of said Lot 1, distant thereon north 73 degrees, 07 minutes, 00 seconds east, 34.21 feet from the southwesterly corner of said Lot 1.

2. As of September 5, 1986, the cross-complainants LOUIS C. EZELL and SUSAN EZELL had established and are the owners of an easement by prescription for the continual, present and future use, repair, maintenance and control of all of the significant items within the legally described fenced area mentioned above, including, but not limited to, the pool, pool equipment, pool house shed, concrete and redwood decking, concrete retaining walls, wood and concrete steps, blacktop driveway, landscaped garden, trees and shrubs.

3. That the Plaintiff ANTHONY ELDRIDGE shall retain the underlying fee ownership interest in the property described within the fenced area mentioned above, but subject to an easement by prescription of the cross-complainants LOUIS C. EZELL and SUSAN EZELL and their successors in interest.

4. That both parties be ordered restrained from molesting, harassing, threatening or interfering with one another in any manner whatsoever or coming to or upon the property of the other, and that neither party shall utilize the street in front of the other's property for other than usual and ordinary travel.

5. That defendants and cross-complainants take nothing by way of their action for trespass, invasion of privacy, specific performance or quiet title (agreed boundary cause of action).

6. That plaintiff shall take nothing by his complaint for willful or negligent trespass, declaratory relief or quiet title and that the cross-complainants LOUIS C. EZELL and SUSAN EZELL have and recover their costs from the cross-defendant ANTHONY ELDRIDGE.

Dated: 3-20-89

/S/
JAMES N. REESE, Judge (Retired)
of the Superior Court

STATEMENT OF DECISION - TRIAL COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ANTHONY ELDRIDGE, Plaintiff, vs. LOUIS C. EZELL, SUSAN EZELL, et al., Defendants.	CASE NO. C 615 510 STATEMENT OF DECISION

This case came on regularly for trial before this Court sitting without a jury on October 31, 1988, the Honorable James N. Reese, Judge (Retired), presiding; after completion of the trial on November 17, 1988, and the receipt by the Court of oral and written arguments or- counsel, the matter was submitted for decision.

Throughout these proceedings, plaintiff and cross-defendant (hereafter plaintiff) was present and represented by Robert L. Scott, Esq., defendants and cross-complainants (hereafter defendants) were present and represented by Russell J. Thomulka, Esq.

[Page 1]

On November 21, 1988 this Court caused to be filed herein pursuant to CRC § 232 its Announcement of Tentative Decision. Plaintiff duly filed his Request for Statement of Decision and Objections to Tentative Decision on November 29, 1988. Thereafter, on December 2, 1988, the Court directed counsel for defendants to prepare, file and serve a proposed

Statement of Decision.

The proposed Statement of Decision, erroneously entitled "Findings of Fact and Conclusions of Law" was served on counsel for plaintiff on December 6, 1988 by defendants' counsel.

Plaintiff's counsel duly filed objections to the proposed Statement of Decision and on January 27, 1989, the Court heard arguments by both parties on Plaintiff's Request and Objections and the matter was duly submitted.

The Court, having heard the testimony, examined the proof offered by the respective parties, after considering all the evidence, oral and written arguments and briefs presented or filed by both parties during, before and after the trial, and the Court having personally viewed the subject real property during the course of the trial in the presence of counsel and the parties pursuant to stipulation, the Court, being fully advised in the premises, now issues its Statement of Decision herein pursuant to CRC § 232 and CCP § 632 as follows:

I. FACTUAL BASIS FOR DECISION

A. The Court finds that clear and convincing evidence presented at trial establishes the following facts concerning the principal controverted issues:

1. On October 18, 1985, plaintiff became and remained at all pertinent times herein the record owner of the following

unimproved realty located in Los Angeles County.

> Lots 1 and 2 of Tract No. 865, as per map recorded in Book 16, Page 97 of Maps; Lots 491, 492, 493 and 494 of Tract No. 865, as per map recorded in Book 16, Page 97 of Maps; Lots 350, 351, 352 of Tract No. 978, as per map recorded in Book 16, Page 34 of

Maps in the Office of the County Recorder of the County of Los Angeles, State of California.

2. On July 23, 1975, defendants became and remained at all pertinent times herein the record owners of certain improved real property located adjacent to plaintiff's property. Defendants' property is commonly known and designated as 8540 Cole Crest Drive, Los Angeles, California, and is more particularly described as follows:

Lots 353, 354, and 355 of Tract 798, as per map recorded in Book 16, Pages 34 and 35 of Maps, in the Office of the County Recorder of the County of Los Angeles, State of California.

3. That commencing with the 23rd day of July, 1975, and continuing through to the time of trial, defendants have continuously, openly and notoriously occupied, used and possessed the following described portions of plaintiff's realty referred to in Paragraph Al hereinabove:

Lot 352, Tract No. 798, in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 16, Page 34 of

[Page 3]

Maps, in the Office of the Recorder of said County, and those portions of Lots 1, 493 and 494, Tract No. 865, in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 16, Page 97, in the Office of the Recorder of said County, lying southerly and easterly of the following described lines:

Beginning at the northwest corner of said Lot 352, thence south 83 degrees, 41 minutes, 00 seconds west, 34.64 feet, along the westerly prolongation of the northerly line of said Lot 352; thence south 14 degrees, 05 minutes, 42 seconds west 82.81 feet to a

point in the southerly line of said Lot 1, distant thereon north 73 degrees, 07 minutes, 00 seconds east, 34.21 feet from the southwesterly corner of said Lot 1.

The above property will hereafter be referred to as "the subject property," since this is the legal description of that portion of plaintiff's property which plaintiff claims defendants have trespassed upon and upon which defendants claim a right to easement by prescription.

4. That fences surrounding the subject property were originally installed in 1951 along the same lines as the fences which were in place at the time of filing of this action. The original fences encroaching upon and enclosing all of Lot 352 of

the subject property on the north were installed in 1951 by one John Fulton, a predecessor owner of defendants' property from 1951 through 1959. That the original fences encroaching upon Lots 1, 493 and 494 of the subject property were installed in 1951 by one Earl McKnight, a predecessor owner of Lot 1 of the subject property. That the defendants have continuously maintained and reinforced the fences along their original lines from the date of purchase of their property on July 23, 1975 to the date of filing of this action on September 5, 1986, a period in excess of eleven (11) years.

5. The location of the swimming pool, pool equipment, and concrete decking on defendants' property encroaches upon the subject property; that the same were constructed in July of 1960 by a predecessor owner of defendants' property. that defendants maintained said equipment, pool equipment and decking continuously from the time of purchase of their property to the date of filing of this action, a period in excess of eleven (11) years.

6. That at the time of purchase of their property, the

defendants received reliable professional advice, which they accepted, to the effect that their property encroached upon the subject property in the above particulars, and that further encroachment was effected by the driveway leading to their residence, the trees and shrubs within the fenced area, and the garbage container enclosure on the driveway. Defendants maintained these items continuously from July 23, 1975 to the date of filing of this action on September 5, 1986, a period in excess of eleven (11) years.

[Page 5]

7. That between July 23, 1975 and September 1, 1981, defendants erected redwood decking around the swimming pool on the subject property, placed concrete steps along the hillside of the subject property, erected a pool shed on the subject property, and partially gunited the hillside wall of Lot 352 of the subject property. These improvements were completed more than 5 years prior to the date of filing of the within action and were maintained by defendants continuously for more than 5 years immediately preceding September 5, 1986, the date of filing of the action herein.

8. That all of the items of encroachment upon the subject property, including but not limited to fences, the pool, pool equipment, pool house shed, concrete and redwood decking, concrete retaining walls, wood and concrete steps, blacktop driveway, and landscaped gardens, trees and shrubs, were initially installed, and/or planted by defendants and/or their predecessors more than 5 years prior to September 5, 1986; that the same were maintained continuously in their same condition for a period in excess of 5 years prior to September 5, 1986 and up to time of trial with the knowledge of, but without the consent and/or authorization of plaintiff.

9. That the defendants intended by the erection and maintenance of the above improvements on the subject property to stabilize the 45 degree hillside -slope of Lot 352, to protect their pool, yard, and residence from erosion damage, to prevent and exclude uninvited guests from coming

upon the subject property and to use said property for the personal enjoyment of their family to the exclusion of all others.

[Page 6]

10. That the possession and use of said property by defendants was knowingly exercised by defendants with full and complete knowledge that they were not the record owners thereof, such knowledge having germinated with the date of defendants' purchase of the subject property on July 23, 1975 and continuing up to the time of trial.

11. That the defendants intended to establish and maintain a prescriptive easement upon the subject property without permission of the plaintiff or any prior owners of said subject property.

12. That the use and possession of the subject property by defendants was visible, open and notorious, hostile, continuous and adverse to plaintiff and the prior owners of said subject property for a period of more than 5 years prior to September 5, 1986, the date of filing the instant lawsuit.

II. LEGAL BASIS FOR DECISION

A. The following constitute the legal basis for the Court's decision:

1. The Court finds that defendants have not produced sufficient evidence to support a finding in their favor on their allegations of trespass, invasion of privacy, specific performance or quiet title (agreed boundary).

2. The Court finds that plaintiffs have not proven by clear and convincing evidence their allegations of willful or negligent trespass, declaratory relief or quiet title.

3 . The Court finds that defendants have established by clear and convincing evidence that they are the owners of an

easement by prescription for the continual, present and future use, maintenance and control of all of the items within the fenced subject property, including, but not limited to, fences, the pool, pool equipment, pool house, concrete and redwood decking, concrete retaining walls, wood and concrete steps, blacktop driveway, landscaped garden, trees and shrubs.

4. That plaintiff is the owner of the underlying fee interest in the subject property subject to the prescriptive easement of the defendants.

5. That plaintiff did not establish by clear and convincing evidence that the acts allegedly committed by defendants constituted harassment or intent to vex or annoy. That pursuant to stipulation, both parties should be ordered restrained from molesting, harassing, threatening, or interfering with one another in any manner whatsoever or coming to or upon the property of the other party and that neither party shall utilize the street in front of the other's property for other than usual and ordinary travel.

6. The Court finds that plaintiff's request "that findings of fact and conclusions of law be provided on the issues controverted at trial" is in fact a request for a statement of decision stated in terms of numerous evidentiary facts, not ultimate facts, and therefore must be respectfully declined.

B. The Court concludes and determines as follows:

1. The use and possession of the subject property by defendants was open and notorious, hostile, continuous and adverse to plaintiff and the prior owner for a period of more than 5 years prior to September 5, 1986, the date of filing of

the instant lawsuit.

2. Defendants, by clear and convincing evidence, have a right to a prescriptive easement in the subject property; that plaintiff retain the underlying fee, and that a judgment of quiet title to the prescriptive easement should issue in favor of defendants;

3. That both parties be ordered restrained from molesting, harassing, threatening, or interfering with one another in whatsoever or coming to or upon the property of the other party; and that neither party shall utilize the street in front of the other's property for other than usual and ordinary travel; and

4. That plaintiff shall take nothing by his complaint and be dismissed henceforth and defendants have judgment mentioned herein with costs of suit.

LET THE JUDGMENT BE ISSUED.

Dated: 3-20-89

/S/
JAMES N. REESE, Judge (Retired)
of the Superior Court

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am an attorney at law, and a member of the United States Supreme Court Bar, representing the petitioner in this action; My business address is 15303 Ventura Blvd., Sherman Oaks, California 91403; On the below date, I served the document(s) described as:

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT, DIVISION ONE

on the interested parties in this action by placing a true copy thereof in sealed envelopes addressed as follows:

For Respondent: Louis C. Ezell
& Susan Ezell
Russell J. Thomulka, Esq.
Attorney at Law
16530 Ventura Blvd. Ste. 208
Encino, CA 91436-2028
(818) 995-1387

Appeals Clerk
Los Angeles Superior Court
111 N. Hill Street
Los Angeles, CA 90012

Office of the Attorney General
State of California
P.O. Box 944255
Sacramento, CA 94244-2550

Supreme Court of the
State of California
Ronald Reagan Building
300 South Spring St. Fl. 2
Los Angeles, CA 90013

California Court of Appeal
Second District, Div.One
300 S. Spring St. Fl. 2, N. Tower
Los Angeles, CA 90012

[Filed by U.S. Mail: 40 Copies]
Supreme Court of the United States
1 First St. NE
Washington, DC 20543

[X] On August _____, 1992 I caused such envelopes with First Class postage thereon to be placed in the United States Mail at Sherman Oaks, California.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Robert L. Scott _____

Name of Declarant Signature of Declarant